
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C 20001-8002

Date issued: APR 5, 1996
Case No. 95-ERA-50

In the Matter of
ROBERT FUGATE,
Complainant,

vs.

TENNESSEE VALLEY AUTHORITY,
Employer.

RECOMMENDED DECISION GRANTING EMPLOYER'S MOTION FOR SUMMARY JUDGMENT, DISMISSING CLAIM, AND STRIKING HEARING DATE

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Before:
Christine McKenna
Administrative Law Judge

I. JURISDICTION AND PROCEDURAL HISTORY

This matter arises from a discrimination complaint filed with the Department of Labor ["DOL",] May 18, 1995 by claimant, Robert Fugate, against his employer, the Tennessee Valley Authority [hereinafter "TVA"] [ALJ 1].[1] Mr. Fugate's complaint alludes to the 1989 decision of TVA to remove him from the position of foreman, an action taken on the grounds that he was unqualified due to lack of training. The instant complaint suggests discrimination in TVA's decision in January 1995 to fill the foreman position with an employee from another union, who was equally unqualified as Mr. Fugate apparently was when originally removed.[2] Mr. Fugate further alleges that on January 1, 1995, although he had acquired the qualifications for the job, he was removed from his position as shift supervisor in the TVA fire protection unit because he refused to join the union, despite "constant harassment" by the union shop steward.

The May 1995 complaint was forwarded to the Department of Labor, which reviewed it Linder the Section 211 whistleblower provisions of the Energy Reorganization Act, 42 U.S.C. §5851, and declined to conduct an investigation, on two grounds: (1) that TVA's removal of Mr. Fugate from the foreman position and filling of it with another employee was the result of a labormanagement agreement, and (2) that his removal would have occurred even in the absence of protected activities."[3] The report of the Department of Labor was issued August 31, 1995.

In the meantime, On September 6, 1995, the Secretary issued his decision on Mr. Fugate's previous discrimination claim (see Fn. 2).

On September 8, 1995, Mr. Fugate sent a handwritten letter by telefax to the Office of Administrative Law Judges, referring, to the Secretary's ruling. He requested a hearing, stating that TVA had not disclosed to the Department of Labor all information needed to make a decision [ALJ2]. This was construed as a timely notice of appeal of the Department's decision not to investigate the May 18, 1995 claim, and was duly forwarded to the Office of Administrative Law Judges for hearing. The case is now set for hearing before the undersigned on April 22, 1996, in Knoxville, Tennessee [ALJ 6].

This matter is now before me on TVA's Motion for Summary Decision, filed March 18, 1996 [ALJ 8]. Having reviewed the pleadings and proceedings herein, in particular Mr. Fugate's response to the motion [ALJ 10], I now make the following

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The parties' contentions

TVA contends that the complaint should be dismissed because it concerns a labor-management dispute and not an ERA-protected concern, in that it is related only to union jurisdiction over the fire protection foreman position.

Mr. Fugate alleges that his complaint should not be dismissed because TVA misled the Department of Labor investigator about whether the company conforms to union and

schedule classifications.[4] He claims that TVA has allowed several employees to work outside their classifications, and provided five specific names of employees who have done so. He also states that by "precedent" set in a 1979 union dispute, TVA should have precluded the IBEW job steward from intimidating and harassing him. He claims that this harassment -- by the steward and another employee -- came about because Mr. Fugate is a stearmfitter, and his harassers "made it clear that steamfitters should not fill foreman positions."

B. **Standards for summary judgment**

A motion for summary decision in an ERA whistleblower case is governed by 29 C.F.R. § § 18.40 and 18.41. Under those regulations, both the Secretary and the Sixth Circuit apply the summary judgment standards of Rule 56 of the Federal Rules of Civil Procedure. *Webb v. Carolina Power and Light Co.*, 93-ERA 42, Slip. Op. at pp. 4-6 (Sec'y July 17, 1995); *Howard v. TVA*, 90-ERA-24, Slip. Op. at p. 4 (Sec'y July 3), *1991), aff'd sub nom. Howard v. U.S. Department of Labor*, 959 F.2d 234 (6th Cir. 1992). A party opposing a motion for summary decision must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). Under the analogous Rule 56(e), the non-moving party "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. ... Instead, the [party opposing summary judgment must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-257 (1986). While all inferences must be drawn in the light most favorable to the nonmoving party, the non-moving party's evidence, if accepted as true, must nevertheless support a rational inference that the substantive evidentiary burden of proof can be met. *T.W. Elec. Serv. v. Pacific Elec. Contractor*, 809 F.2d 626, 631 (9th Cir. 1987). If the non-movant "fails to make a showing, sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact and the movant is entitled to summary judgment. *Celotex Corp v. Catrett, 477 U.S. 317, 322-323* (1986).

C. **The Energy Reorganization Act**

The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and established the Nuclear Regulatory Commission, whose primary function was to license and regulate nuclear facilities, and in particular to assure their safe operation. 42 U.S.C. §§5841-5850. Central to the ERA were provisions for employee protection from discriminatory and/or retaliatory personnel action for having reported unsafe acts by the employer facility. The Act as amended in 1992 applies to all claims filed on or after October 24, 1992 and thus governs this proceeding. The Act provides at 42 U.S.C. §5851:

(a) Discrimination against employee

> **(1)** No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee ... --
> **(A)** notified his employer of an alleged violation of this chapter;
> **(B)** refused to encage in any practice made unlawful by this chapter..., if the employee has identified the alleged illegality to the employer;
> **(C)** testified before Congress or at any Federal or State proceeding regarding any provision... of this chapter...;
> **(D)** commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter ... or a proceeding for the administration or enforcement of any requirement imposed under this chapter ...;
> **(E)** testified or is about to testify in any such proceeding or;
> **(F)** assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding [sic] or in any other action to carry out the purposes of this chapter ....
> **(b) Complaint, filing and notification:**
> ... **(3)(C)** The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
> **(3)(D)** Relief may not be ordered... if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

The complainant must, at the outset and at a minimum, "... set forth facts which justify an inference of retaliatory discrimination," that is, the existence of protected activity and an inference of a causal connection with that activity, in order to establish a prima facie case. *Bartlik v. Tennessee Valley Authority*, 73 F.3d 100, 103 (6th Cir. 1996). However, while proof of a prima facie case is a predicate to triggering an investigation (see Fn. 3, above) and to shifting the burden of production to TVA, it is well established that proof sufficient to show a prima facie case is not enough to establish the claim itself Claimant must demonstrate retaliatory, discriminatory action in violation of the statute, and always bears the ultimate burden of persuasion. *Saint Marv's Honor Center v. Hicks*, U.S. , 113 S.Ct. 2742 (1993); *Mcdonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803) (1973); *Dysert v. Flordia Power Corp.*, 93-ERA-21 (Sec'y August 7, 1995). In *Zinn v. University of Missouri,* 93-ERA-34 and 36 (Sec'y January 18, 1996), the Secretary provided a thorough restatement of the burdens of proof and production in ERA whistleblower cases under the Act as amended in 1992:

> Under the burdens of proof and production in "whistleblower" proceedings, a complainant who seeks to rely on circumstantial evidence of intentional discriminatory conduct must first make a prima facie case of retaliatory action by the respondent, by establishing that he engaged in protected activity, that he was subjected to adverse action, and that the respondent was aware of the protected acitivity when it took the adverse action. ... Additionally, a complainant must

> present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. ... If a complainant succeeds in establishing the foregoing, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action.
> The complainant bears the ultimate burden of persuasion that the respondent's proffered reasons are not the true basis for the adverse action, but are a pretext for discrimination. ... The complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for protected acitivity. ... Pursuant to Section 211(b)(3) of the ERA, however, if it has been established that the protected activity contributed to the adverse action, the employer must demonstrate by "clear and convincing evidence" that it would have taken the adverse action in the absence of the protected activity. ...[5]

The key elements of the claim at the outset, then, are that claimant enaged in protected activity, which was itself the reason for the allgedly retaliatory action.

D. Undisputed material facts

In support of its position, TVA has proffered evidence that it is bound by the terms of a negotiated collective bargaining agreement, known as the General Agreement, with the Tennessee Valley Trades and Labor Council, which represents TVA's trades and labor employees [Ex. A, NfcClure Affidavit]. Under Paragraph VIII(3) of the General Agreement, a Joint Classification Committee is charged with establishing "basic classification and related qualification standards" concerning various trade and labor positions. Mr. Fugate is a steamfitter. The steamfitter position is classified on Schedule B for regular maintenance work. The steamfitters are represented by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry ["the Steamfitters"]. Since 1988, the position of fire protection foreman has been classified as Schedule D, the schedule for regular operating work. Fire protection foremen are represented by the International Brotherhood of Electrical Workers ["the IBEW"].

On October 11, 1993, Mr. Fugate was temporarily promoted to the position of fire protection foreman. This engendered a grievance by the IBEW job steward [Ex. C to McClure Affidavit], and in November 1994 TVA's manager of trades and labor relations decided that the foreman position (a Schedule D classification) could not be filled by a steamfitter (a Schedule B classification) because of the terms of the General Agreement and the standards of the Joint Classification Committee [Ex. D to McClure Affidavit]. As a result, Mr. Fugate was removed from the foreman position, which was then filled from the Schedule D classification represented by the IBEW, and he returned to his job as a steamfitter.

On January 31, 1995, Mr. Fugate filed a grievance over his removal from the supervisory position, requested the removal of two Schedule D employees serving as foremen, and also requested the termination of the IBEWjob steward. In an attached written statement, he complained that there had been several occasions when the foreman position had been filled by non-union members and Schedule B employees. [Ex. E to McClure Affidavit].

On February 9, 1995, TVA responded by advising that the basis for the complainant's removal as a foreman was "the nonexistence of that position in the Schedule B labor class for the Fire Protection Department." Apparently the company attempted to address the question with the Joint Classification Committee, in order to obtain foremen positions for Schedule B employees [Ex. F, McClure Affidavit]. In a supplemental response in May 1995, TVA advised Mr. Fugate to address the dispute with the Joint Classification Committee itself, as required by the General Agreement. Around this time, Mr. Fugate filed a charge against TVA with the National Labor Relations Board, alleging an unfair labor practice, but the charge was withdrawn shortly thereafter [Exs. H and 1, McClure Affidavit].

The day after TVA advised Mr. Fugate to address his Grievance to the Joint Classification Committee, he instead filed the instant complaint which is now before the unddersigned. There is no evidence that he ever took his grievance to the Joint Classification Committee.

Mr. Fugate does not directly address any of the foregoing facts documented in Ms. McClure's affidavit. Instead, he basically repeats the contentions of his complaint, without sLipporting documentation, in an unsworn statement. Most importantly, Mr. Fugate admits that his discrimination charges to the Department of Labor do not arise under Section 211 the ERA. He admits that he filed a complaint of discrimination with the Department of Labor only after the NLRB informed him that it [the NLRB] had no Jurisdiction over TVA, suggesting that his resort to the Department of Labor was a fallback position. He admits that the issue is not safety related at all. Instead, he suggests that there is circumstantial evidence of some retaliatory motive, in that the company has deviated from the General Agreement in several instances but has strictly enforced it as to him. Significantly, he does not identify any protected activity whatsoever that might have been the basis for the alleged retaliation. It seems that he feels that he has been badly treated, although there is no evidence of what the reason may be. [Ex. 1O]

As a result, Mr. Fugate's claim must fail. He admits that his complaint has nothing whatsoever to do with the safety issues protected under the statute. As the Secretary succinctly found in Mr. Fugate's previous complaint, "in order to prevail in an environmental whistleblower case, the complainant must first show that he engaged in protected acitivity." *Fugate v. TVA*, 93ERA-9 (Sec 'y September 6, 1995). As in Mr. Fugate's previous claim, he has "... neither pled nor presented any evidence from which one could conclude that he engaged in protected activity within the meaning, of the environmental whistleblower provisions. Fugate made an internal complaint regarding a personnel issue, not a safety concern." Slip Op. At p. 2. Not only does he admit the lack of protected activity; one can hardly make an inference of a causal connection with the adverse action when there is no proof of protected activity.

Moreover, even if he had engaged in protected activity, the employer has demonstrated a legitimate non-discriminatory reason for taking Mr. Fugate out of the foremans' position. Under such circumstances, Mr. Fuaate continues to retain the burden of showing, a causal connection between his removal and some protected activity, and that the proferred

reason is pretextual. In this, lie has failed utterly. Where the record falls to show that the adverse employment decision arose from retaliation rather than a "legitimate and pragmatic policy decision," the claimant does not even make a prima facie case. *Bartlik v. U.S. Department* of Labor, *supra,* 73 F.3d at 103-104. In short, companies are free to make employment decisions to fire, demote or remove personnel, so long as they do not arise from discriminatory or retaliatory motives. In this case, Mr. Fugate does not dispute that the TVA is bound by the terms of the General Agreement to which it is a party; that the standards for placement are made by a Joint labor-management committee; that the reasons for the allegedly adverse employment action are not related to safety; and that the reason for that action was the General Agreement itself While he implies a deviation from company policy, and perhaps one could view that as an allegation of pretext, he does not identify the reason (such as protected activity) for the alleged deviation from policy, nor provide any evidence of prextext.

Moreover, he implies but does not provide any evidence whatsoever, that the TVA failed to provide information to the Department of Labor which might have altered its conclusion not to investigate further. A motion for summary judgment is the time to provide evidence of such a contention, and Mr. Fugate provides none. As stated above under the standards for summary judgment, he cannot simply rely on allegations at this point.

I must conclude that the complainant has failed to establish a prima facie case. His complaint involves a labor-management dispute, a personnel problem, rather than the safety concerns involved in the statute.

I further conclude that even if complainant had established a prima facie case, and satisfied his burden of proving a causal connection between his removal from the foreman position and some protected activity, there is no evidence whatsoever that the explanation proffered by TVA was pretextual. Even if there were some evidence of pretext, the facts in the record now before me are undisputed, clear and convincing that the TVA would have removed him from the position even in the absence of any alleged protected conduct. By no stretch of the imagination can one draw a rational inference that Mr. Fugate's evidence, even if accepted as true, would satisfy his evidentiary burden of proving this claim.

III. CONCLUSION

For the foregoing reasons, it is hereby recommended that the complaint of Robert D. Fugate dated May 18,1995 against the Tennessee Valley Authority be **DISMISSED WITH PREJUDICE.** The hearing now set for April 22, 1996 is hereby **STRICKEN.**

Christine McKenna
Administrative Law Judge

NOTICE: This Recommended Decision and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals,

U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave. N.W., , Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).

[ENDNOTES]

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[1]The record consists of the eleven documents received or generated by the Office of Administrative Law Judge following referral of the complaint from the Employment Standards Administration, Wage and Hour Division in Knoxville, TN. These are marked ALJ 1-11 and are hereby admitted. The exhibits central to disposition of this motion are: Mr. Fugate's complaint and the DOL referral to this office on August 31, 1995 [ALJ 1]; TVA's motion for summary judgment and the attached affidavit of Heather McClure [ALJ 8]; and Mr. Fugate's response [ALJ 10].

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[2]The events concerning TVA's earlier decision to remove Mr. Fugate as a foreman formed part of his previous complaint against the TVA for "an ongoing pattern of harassment and intimidation." This prior complaint was tried before Administrative Law Judge Earl Thomas, who, after hearing and by decision issued July 12, 1993, recommended the claim be dismissed because it related to a personnel matter rather than a safety, quality control or health issue arising under the Energy Reorganization Act, 42 U.S.C. §5851 [Case No. 93-ERA-9]. Judge Thomas' recommended decision was adopted by the Secretary of Labor on September 6, 1995.

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[3]Section 211 of the Act, 42 U.S.C. §5851(b)(3)(A) and (B), provides that in order to trigger an investigation, the complainant must make a prima facie showing that the allegedly protected activity was a contributing factor in the unfavorable personnel action; and further, that even if the complainant has established a prima facie case, ".... no investigation ... shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of' activity protected under the Act.

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[4]This comment is not entirely clear, in that it may refer to the investigation performed in connection with the June 1991 complaint, or to discussions related to the May 1995 complaint that led DOL not to investigate further.

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[5]The Secretary has clarified that the "clear and convincing" standard of Section 211 is reached only if the dual or mixed motive doctrine is invoked. *Remusat v. Bartlett Nuclear, Inc.*, 94-ERA-36, Slip. Op. at pp. 3-5 (Sec'y February 26, 1996). This means that even if the claimant establishes a prima facie case, the burden shifting to the employer at that point is only to articulate a legitimate, nondiscriminatory, reason for the adverse action. The burden remains always with the complainant to establish a protected activity, a causal nexus to the adverse action, and evidence of pretext. It is only after complainant satisfies this burden that "clear and convincing" evidence is required from

the employer. See also *Gibson v. Arizona Public Service Co.*, 90-ERA-29, -46, and -53, Slip Op. at pp. 2-3 (Sec'y September 18, 1995).